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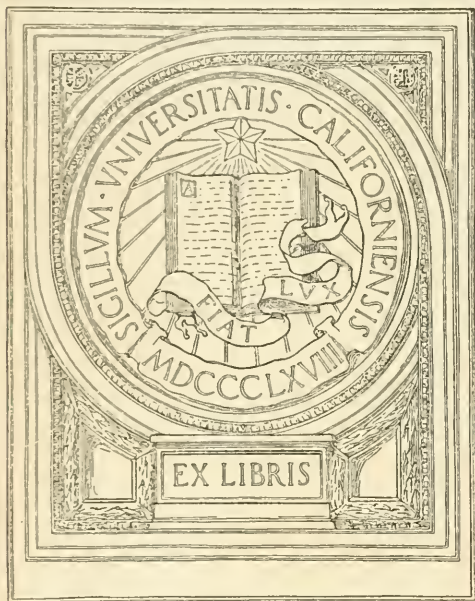
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I. Goldtree, Plaintiff Vs. John D.  
Spreckels, Defendant. Opinion Of  
Hon. E. S. Torrance, Judge Of The  
Superior Court

By  
E. S. Torrance

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AT LOS ANGELES



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IN THE  
SUPERIOR COURT  
OF SAN DIEGO COUNTY,

STATE OF CALIFORNIA.

I. GOLDTREE,

*Plaintiff.*

vs.

JOHN D. SPRECKELS,

*Defendant.*

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OPINION OF

HON. E. S. TORRANCE,

Judge of the Superior Court,

Upon the Validity of certain Street Improvement Bonds, and holding that the decision in Norwood vs. Baker, 172 U. S. Reports, page 269, does not affect the constitutionality of the Vrooman Act.

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IN THE  
SUPERIOR COURT

— OF THE —

County of San Diego,

STATE OF CALIFORNIA.

I. GOLDTREE,

*Plaintiff.*

vs.

JOHN D. SPRECKELS,

*Defendant.*

Opinion of the  
Court.

STATEMENT OF THE CASE.

On the 6th day of February, 1893, the Board of Trustees of the City of Coronado, a city of the sixth class, passed a resolution of intention to grade, pave and sidewalk Orange Avenue. The resolution declared that the Board had found, upon estimates directed to be furnished it by the City Engineer, that the cost of the proposed work would be greater than two dollars per front foot along each line of said Ave-

enue, including the cost of intersection work, and that the Board had determined that serial bonds, bearing interest at the rate of ten per cent. per annum, and extending over the period of ten years from their date, should be issued to represent the cost and expenses of such work, and in the manner and form provided by law. An order directing the work to be done was afterwards passed by the Board of Trustees, and in consequence of subsequent proceedings the proposed work was completed. The plaintiff owned a lot fronting on said Orange Avenue, upon which there was an assessment made by the Street Superintendent of a sum exceeding fifty dollars, as its proportion or share of the cost of making said improvement. That assessment not being paid, such proceedings were had and taken that on or about the tenth day of January, 1894, the Treasurer of said City made and delivered to the contractors who performed said work a bond to represent said assessment. Thereafter the interest on said bond not being paid, such proceedings were had and taken that the Treasurer of said City advertised said lot for sale to pay the interest and principal of said bond, and, on the 27th day of August, 1898, the lot was sold pursuant to such proceedings, and the defendant became the purchaser thereof at such sale; and, on the same day, said City Treasurer issued to the defendant a certificate of such sale. The plaintiff alleges that, unless the defendant is restrained and enjoined, he will give notice of application for a deed, and take a deed for said lot and thereby cloud plaintiff's title thereto.

The plaintiff alleges that the Board of Trustees of said City never at any time designated any newspaper in which the notice of street work should be published, unless such designation is contained in said

resolution of intention. He further alleges that the Board of Trustees of said City of Coronado never acquired jurisdiction to authorize the grading of said Orange Avenue, because no dedication thereof had been made sufficient to warrant the exercise of such power by the Board of Trustees. The plaintiff also alleges that the Treasurer of said City advertised and gave notice of the sale of said lot, and that the same was sold at the sale for which said certificate was given, in the office of the Tax Collector of the County of San Diego, and without the boundaries of said City of Coronado. It is further alleged that the assessment for the cost of said work was made upon the lots fronting upon said Orange Avenue, including the plaintiff's lot, according to the frontage of said lots upon said Avenue, pursuant to the provisions of the Street Improvement Act of this State, requiring assessments to be made upon the property abutting on the improvement, at a rate per front foot sufficient to cover the total expense of the work. It is further alleged that all of the proceedings were had and taken in violation of the Fourteenth Amendment to the Constitution of the United States, and particularly that clause thereof which prohibits any State from depriving any person of property without due process of law. The amended complaint also alleges that there were a great number of irregularities, specifying them, in the aforesaid proceedings which resulted in the sale of plaintiff's lot. I deem it unnecessary to specify in detail, or at all, these alleged defects, or departures from the requirements of the law, in the aforesaid proceedings, for the reason that I regard them as mere irregularities which were cured or dispensed with by the provisions of the statute under which the proceedings were had.

These proceedings were initiated under the amendment to the Street Improvement Act of this State, approved March 17th, 1891 (Stat. 1891, p. 116). This amendment provides that the issuance of the bond shall be *conclusive evidence* of the regularity of all previous proceedings and of the validity of the lien. On February 20th, 1893, the Legislature passed an Act entitled "An Act to provide for a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," (Stat. 1893, p. 33) which in its general features is similar to the amendment to the Street Improvement Act passed by the Legislature in 1891. The Act of 1893 repeals the amendment of 1891, "except as to any and all proceedings hitherto commenced thereunder, which proceedings may be completed and have full force as is therein provided." In 1899 the Legislature amended the Act of 1893, the main provisions of the former Act being still retained in the amendment thereto. The amendment of 1899 provided that the bonds, by their issuance, should be *prima facie* evidence of the regularity of all previous proceedings had under the general Street Improvement Act, and also of all proceedings had under the Act of 1893, as amended in 1899, previous to the making of the certified list of unpaid assessments by the Street Superintendent, and also of the validity of the street assessment lien up to the date of said list.

The sufficiency of the amended complaint is challenged by a general demurrer.

## OPINION OF THE COURT.

The first question of law which arises is this: What probative effect is to be given to the bond issued in the course of the proceedings referred to in the amended complaint? Is such bond to be regarded merely as *prima facie* evidence of the regularity of the proceedings, or is it to be regarded as *conclusive evidence* of their regularity? On the plaintiff's side, it is claimed that the amendment of 1899 controls. That the Legislature has full power to alter or change the rules of evidence at its pleasure, and that the amendment of 1899 makes municipal improvement bonds only *prima facie* evidence of the regularity of the proceedings. On the other side, it is contended that the provisions of the amendment of 1891, making the bond conclusive evidence, entered into and became a part of the contract of the holder of the bond, and of the contract of the purchaser at the tax sale; and that, therefore, the Legislature had no constitutional power to change the statute in force at the time the contract was entered into and the sale was made, establishing a conclusive presumption, by enacting a subsequent statute which created merely a *prima facie* presumption. In my judgment, the contention of defendant's counsel, both upon reason and authority, must be sustained.

Judge Cooley in his Treatise on Taxation, under the title of Curative Laws, classifies them as follows (Cooley on Tax., p. 297.):

"An act of dispensation may assume any one of several forms.

1. It may assume the form of a rule of conclusive evidence intended to preclude a departure from the law being proved.

2. It may take the form of a mandate to officers, commanding them to give effect to proceedings that have been taken, and to disregard in doing so any irregularities or other defects.

3. It may be a special curative statute to heal defects in certain specified proceedings, which have been before taken.

4. It may be a general curative statute to heal irregularities or defects in any proceedings, whatsoever, previously taken.

5. It may be a general statute for future cases, which, while marking out a course for the officers to pursue, shall at the same time declare that irregularities shall not vitiate any proceedings that shall be had under the statute.

6. Besides these, there may be either a special or a general law for reassessing the tax when the proceedings for its collection have proved ineffectual."

The legislative intent, and the legal effect of the legislative enactment, are precisely the same whichever method the legislature may adopt. The intent and legal effect of all such statutes is to preclude the land owner from taking advantage of any irregularities, other than jurisdictional defects, which may have occurred in the proceedings. An act of the legislature which declares that the issuance of the tax deed, or any other instrument issued in the course of the proceedings, shall create a conclusive presumption of the regularity of previous proceedings is not a mere rule of evidence, as that term is ordinarily used; but such an act creates a right in favor of the holder of the instrument, which cannot be taken from him by subsequent legislation without his consent. Such an act is, in every essential particular, as much a part of the

law of the land as a general statute which, while prescribing the steps to be taken, also declares that no irregularities shall vitiate the proceedings; and contracts entered into upon the faith of such provisions, are as fully protected in the one case as in the other.

It may be conceded that a statute which provides that a tax deed, or other instrument issued in tax proceedings, shall be presumptive evidence of the regularity of all previous steps, may afterwards be repealed. It is clear, in such a case, it was not the original legislative intent to estop the land owner from proving the fact that irregularities had occurred in the proceedings. The intention of the legislature was merely to shift the burden of proof from the holder of the instrument to the owner of the land, and it is competent for the legislature to afterwards shift the burden to the other side.

The Supreme Court of North Dakota, in *Roberts v. National Bank*, reported in 79 N. W., 1050, disposes of the question under discussion, as follows:

"Section 1639 Comp. Laws, which was in force when the tax sale was made upon which the tax deed rests, reads as follows: 'Such deed shall be executed by the County Treasurer under his hand, and the execution thereof shall be attested by the County Clerk with the county seal, and such deed shall be conclusive evidence of the truth of all the facts therein recited, and *prima facie* evidence of the regularity of all the proceedings from the valuation of the land by the Assessor up to the execution of the deed.' This statute entered into the contract of purchase, and became a part thereof. In *Cooley Tax'n.*, 545, it is said: 'Now, the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in

one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy.' See *Morgan v. Commissioners*, 27 Kan., 80; *Forqueran v. Donnelly*, 7 W. Va., 114; *Merrill v. Dearing*, 32 Min., 476; 21 N. W., 721; *Robinson v. Hovee*, 13 Wis., 341. The defendant Bank is, therefore, entitled to the full benefit of that provision so far as it is competent legislation, but it is likewise bound by it if it operate to its disadvantage.'

In *Robinson v. Hovee*, *supra*, the Supreme Court of Wisconsin held that, when land has been sold for taxes under a law which provided that the owner might redeem it within a specified time after the sale, it is not in the power of the legislature by a subsequent act, although passed before the expiration of that time, to extend the privilege of redemption for a longer period. To do so would be to impair the obligation of the contract.

In *Merrill v. Dearing*, *supra*, it was held that the right of redemption from a tax sale must be governed by the law in force at the date of the sale; it can be neither shortened nor extended by subsequent legislation.

In *Smith v. Cleveland*, 17 Wis., 556, the question under consideration was directly decided. In this case the Supreme Court of Wisconsin held that a tax deed, executed under a statute which made it conclusive of the regularity of the prior proceedings, could not, by a subsequent statute, be reduced to mere *prima facie* evidence of such fact. The rule enunciated in *Smith v. Cleveland* was followed and approved in *Marx v. Hanthorn*, 36th Fed., 579.

The only decision, of a court of last resort, holding to the contrary, to which my attention has been called, is *Stroder v. Weshler*, decided by the Supreme Court of

Oregon, and reported in 16 Pac. Rep., 926. In my judgment this decision is not based upon sound principle. It will also be observed, on the petition for rehearing, the Supreme Court of Oregon, although adhering to its previous views, stated that the members of that Court concurring in the decision were "conscious that the question approaches very near to the dividing line between the remedy and the obligation of contracts."

There is another reason which constrains me to hold that the provisions of the amendment of 1899, making municipal improvement bonds only *prima facie* evidence of the regularity of the previous proceedings, do not apply to the bonds issued in the proceedings in the case at bar. It is well settled that a statute should not receive a construction which would give it a retroactive effect, unless such an intention clearly appears from the words of the statute. There is nothing in the amendment of 1899 which indicates such a legislative intent. This rule is announced by the Supreme Court of this State, in *Houston v. McKenna*, 22 Cal., 553, in a case not dissimilar to this one. I quote from the language of the opinion, as follows:

"The complaint avers that the proceedings for the grading of this street commenced on the 27th day of August, 1860; that the Superintendent of Streets, on the 23rd day of November, 1860, entered into a contract with the plaintiff to do the work. That he performed the work, which was duly approved by the Superintendent, who on the 4th day of October, 1861, assessed and apportioned the amount upon the adjacent lots, each lot being separately assessed in proportion to the assessed value of the same, according to the assessment roll last completed prior to the making of the contract. The defendant insists that the assessment is void, because not made in accordance with the provision of the Act of May 18, 1861, which was in force when the assessment was made, and which pro-

vides that 'the expense of construction of any street, or portion of a street, shall be assessed upon the lots of land fronting thereon, each lot or portion of a lot being separately assessed, in proportion to its frontage, at a rate per front foot to cover the total expenses of the work.' On the contrary, the plaintiff contends that the law in force at the time the contract was made—the Act of March 28th, 1859—controls the rights of the plaintiff, and that the assessment, being made in accordance with that law, is valid. The difference between the two statutes is simply this—the Act of 1859 provides that assessments shall be according to the value of the lots, and the Act of 1861, according to the street frontage of each lot.

The plaintiff made the contract in view of the right, which the law then in force gave him, to resort to the property and its owners for payment of the work done in grading the street. In this respect, the law of 1859, so far as it regulated the extent and nature of that liability, formed part of the contract, and could not be essentially changed without impairing the obligation of the contract, which could not be done without a violation of the Constitution. The Act of 1861 changes the rights of the plaintiff and the liability of the property and its owners, by changing the extent of that liability—making some to pay more and others a less sum than they would have been liable to pay under the Act of 1859. Such a result can only be avoided by giving the Act of 1861 a prospective effect—that is, limiting its application to those contracts made after it took effect. It is a well settled rule of law that statutes should not receive a retroactive construction, unless the intention of the legislature is so clear and positive as by no possibility to admit of any other construction. (Sedgwick on Stat. and Con. Law, 193, 407.). There is nothing in the language of the Act of 1861 amendatory of Section 36 which makes it necessary to give it a retroactive effect, so as necessarily to include contracts made before its passage, and it should, therefore, be construed to apply only to subsequent contracts. (*Crichton v. Pragg*, 21 Cal., 115; *Scarborough v. Dugan*, 10 *id.*, 305)."

Again, it is quite doubtful whether the amendment of 1899 has any reference to, or in any manner affects, proceedings which had been commenced under the Act of 1891, at the time of the passage of the Act of 1893. The Act of 1893 was an independent act, and not an amendment of the Street Improvement Act, as was the Act of 1891. It contained a saving clause, however, as to proceedings theretofore commenced under the Act of 1891, which proceedings were to be completed and have full force as provided in the Act of 1891. The Act of 1899, being an amendment to the Act of 1893, and containing no reference to the Act of 1891, it would seem that the provisions of the Act of 1899, making the bond *prima facie* evidence only of the regularity of the proceedings, could not be held to apply to proceedings which had theretofore been prosecuted under the Act of 1891.

The foregoing considerations convince me that the bonds issued in the present case must be held to be conclusive evidence of the regularity of all previous proceedings, except as to those matters which the law regards as jurisdictional. One of such matters is the designation by the Board of Trustees of a newspaper in which the notice of street work is to be published. On this point the following statement is found in the resolution of intention: "The Seaport News is hereby designated as the weekly newspaper published in this City in which this resolution of intention shall be published for two days, *and the notice thereof for one day*, as often as said newspaper is issued therein."

The Statute requires the Superintendent of Streets to publish a notice of the passage of the resolution in a newspaper designated by the City Council. It seems to me that the words "*and the notice thereof*"

(the resolution) for one day,' found in the resolution of the Board of Trustees, could have reference only to the notice of the passage of the resolution required to be published by the Street Superintendent. That would be the natural construction to be given to the language. There is no claim that a notice of the passage of the resolution of intention was not published by the Street Superintendent in the newspaper designated. If such were the fact, the allegation would doubtless have been made in the amended complaint. In the absence of such an allegation, it must be held that the Superintendent of Streets construed the language as authorizing him to publish the notice required by Statute in the Seaport News, and that he acted accordingly. See *King v. Lamb*, 117 Cal., 403.

It may be conceded that, if Orange Avenue had never been in such manner dedicated to the public as to authorize the Board of Trustees of the City of Coronado to order the grading of the street, then all the proceedings in this case were void. The grant of the Coronado Beach Company, dedicating to the public use the streets and avenues (including Orange Avenue) designated on "the official map of the South Island of the Coronado Beach," was made subject to the exclusive right reserved by the grantor of fixing and establishing grades, and from time to time of altering the same in respect to said streets and avenues. No such right as that, however, could lawfully be reserved to the dedicator of streets for public use. The rule is stated in the American and English Encyclopedia of Law, Second Edition, Volume 9, page 75, as follows:

"The right of the dedicator to annex conditions to the dedication is limited, however, by the rule that the conditions must not be such as would prevent a reasonable enjoyment of the dedication, or be in any way

inconsistent with such enjoyment. No condition may be annexed which will take the property from the control of the duly authorized public officers, or which will in any way impair the usual exercise of the police power by the proper authorities. Should an attempt be made to add such conditions, the dedication will be upheld and the conditions be held void."

The other alleged defects in the proceedings are, in my opinion, as heretofore stated, mere irregularities. They are numerous and a restatement of them here would be of no practical benefit, and would unnecessarily add to the length of this opinion. I will briefly refer to the authorities, under which I hold that they are not jurisdictional defects.

In *Mattingly v. District of Columbia*, 97 U. S., 690, it is said:

"Judge Cooley, in view of the authorities, asserts the following rule: 'If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' (Cooley, Const. Lim., 371.) This rule, we think, is accurately stated."

In *Williams v. Supervisors*, 122 U. S., 164, the rule is stated by the Supreme Court of the United States as follows:

"The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might

originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case, to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided, always, that intervening rights are not impaired. Such is the conclusion of numerous adjudications by the State Courts upon the effect of curative acts, and of this Court in *Mattingly v. Dist. of Columbia*, 97 U. S., 687, 690."

*May v. Holdridge*, 23 Wis., 98, was an action where the plaintiff sought to restrain the sale of certain lots for assessments imposed for street improvements. In that case the Supreme Court of Wisconsin stated the rule thus:

"This rule must, of course, be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the Legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the Legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done I think it competent for the Legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement and provide for a re-assessment of the tax to pay for it."

Another objection is made, which challenges the validity of the tax sale. It is alleged in the amended complaint that the City Treasurer advertised and

gave notice of the sale, and that the lot was sold, in the office of the Tax Collector of the County of San Diego, and without the boundaries of the City of Coronado. Ordinarily a municipal officer cannot exercise official powers outside of the corporate limits of the municipality. The Statute of 1891, however, clothed the City Treasurer with all the powers and duties of the Tax Collector in the collection of unpaid state and county taxes, and directed him to advertise and sell lots and lands, upon which the assessment had not been paid, in all respects the same as provided by law for the collection of delinquent state and county taxes. The provisions of the Political Code then in force in respect to the sale of lands for state and county taxes, were as follows (Sec. 3768, as amended in 1887, Stat. 1887, p. 157): "The time of sale must not be less than twenty-one nor more than twenty-eight days from the first publication, and the place must be in or in front of the Court House or the Tax Collector's office, as the Board of Supervisors may, by resolution direct, for all state and county taxes." Under this provision the City Treasurer was required to conduct the tax sale at the place prescribed by law for the sale of property by the County Tax Collector for delinquent state and county taxes, which appears to have been done in this case.

I now come to the consideration of the last and principal contention made by plaintiff's counsel, viz: that, on the authority of *Norwood v. Baker*, 172 U. S., 269, the provision of our Street Improvement Act directing that the expenses incurred for street work shall be assessed upon the lots and lands fronting thereon, in proportion to their respective frontage, at a rate per front foot sufficient to cover the expenses of the work, violates the provision of the Fourteenth

Amendment to the Federal Constitution prohibiting any State to deprive any person of property without due process of law, and is therefore unconstitutional and void.

Since the promulgation of the opinion of the Supreme Court of the United States in the Norwood case, there have been by the Superior Courts of this State and Courts of other jurisdictions, widely different opinions expressed as to the proper construction to be placed on the opinion in the Norwood case, and as to what were the principles of law intended thereby to be declared. It seems to me, however, that a careful analysis of the opinion in the Norwood case, keeping in view the former decisions of the Supreme Court of the United States on the points discussed in the Norwood case, and the previous decisions of the State Courts whose opinions are cited in support of the conclusions reached in the Norwood case, will satisfy the mind of a candid inquirer that the only rules of decision intended to be established by the Supreme Court of the United States are the following:

First, that the principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is specially benefitted, and, therefore, that the owners do not in fact pay anything in excess of what they receive by reason of such improvements; and that the exaction from the owner of private property of the cost of public improvements in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. And:

Second, that a provision in a State Statute which *expressly, or by necessary implication* authorizes a mu-

municipal corporation to levy a special assessment upon property abutting on a public street, in proportion to the frontage of said property upon the street, to meet the cost of such improvements, *but without taking any special benefit to the property into account*, contravenes that clause of the Fourteenth Amendment to the Constitution of the United States which prohibits a State to deprive any person of property without due process of law; and especially that this is true when the statute affords the property owner no opportunity to be heard upon the question of the apportionment of the expense.

Both of the propositions, above stated as having been declared by the decision in the *Norwood* case, have been generally, if not universally, recognized and enforced by the Courts of this country; and the authorities cited by the Supreme Court of the United States in support of its opinion in the *Norwood* case, fully justify the conclusions reached by the Court as above summarized.

Counsel for Plaintiff, however, contend that the decision in *Norwood v. Baker* authoritatively holds that a State legislature has no constitutional power to determine the lands to be assessed for a street improvement, by defining a territorial district consisting of the property abutting upon the improvement, and directing that the cost of the improvement be assessed upon the abutting property in proportion to the frontage of such property upon the street improved. In my judgment, this view of counsel is not sustained, either by the language of the opinion itself, or by the authorities cited in its support, and that such contention is opposed to the previous decisions of the Supreme Court of the United States, as well as to the opinions of the text writers whose treatises are cited

by the Supreme Court, and is also opposed to the decisions of the State Courts whose opinions are cited to support the conclusions reached in the Norwood case.

The language of the opinion itself clearly indicates that no such doctrine was intended to be established. The following statement is found in the syllabus of the case:

"The constitution of Ohio authorizes the taking of private property for the purpose of making public roads, but requires a compensation to be made therefor to the owner, to be assessed by a jury, without deduction for benefits. The statutes of the State quoted or referred to in the opinion of the Court, make provisions for the manner in which this power is to be exercised. In the case of the opening of a new road, they authorize a special assessment upon bounding and abutting property by the front foot for this entire cost and expense of the improvement, without taking special benefits into account. The alleged improvement in this case was the construction through the property of the appellee of a street 300 feet in length and 50 feet in width, to connect two streets of that width running from each end in opposite directions. In the proceedings in this case the corporation of Norwood manifestly went upon the theory that the abutting property could be made to bear the whole cost of the new road, whether it was benefitted or not to the extent of such cost, and the assessment was made accordingly. *Held*, that the assessment was, in itself, an illegal one, because it rested upon a basis that excluded any consideration of benefits."

Commencing on page 272, the Court cites a number of sections of the Ohio Statute relating to the procedure to be followed by a municipal corporation in making street improvements and providing for the collection of the cost of such improvements. Section 2263 provides that the council may assess the cost of

the improvement, or any part thereof, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation. Section 2264 provides that the council may decline to assess the costs and expenses mentioned in the previous section, or any part thereof, on the general tax list, in which event, such costs and expenses, or any part thereof, which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefitted lots and lands in the corporation, *either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement*, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made.

Section 2271 provides that whenever any street or avenue is opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed *only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved*, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood.

Commencing at page 289, it is said:

"We have seen that, by the Revised Statutes of Ohio relating to assessments, the village of Norwood was authorized to place the cost and expense attending the condemnation of plaintiff's land for a public street on the general tax list of the corporation, Section 2263; but if the village declined to adopt that course, it was required by Section 2264 to assess such cost and expense on the abutting and such adjacent and contiguous or other benefitted lots and lands in

the corporation, *either* in proportion to the benefits which may result from the improvement, *or* according to the value of the property assessed, *or* by *the front foot*, of the property bounding and abutting upon the improvement; while by Section 2271, whenever any street or avenue was opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, 'shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood.' It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefitted or not to the extent of such cost."

Commencing on page 278 it is said: "There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefitted and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law, that the imposition by the Legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the Legislature to prescribe it as a *general rule* that property abutting on a street opened

by the public shall be deemed to have been specially benefitted by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefitted or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement."

The following language is also found on page 278:

"Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County v. Kimball*, 102 U. S. 691, 703, 704; *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 202; *Bauman v. Ross*, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority, the Legislature has a large discretion in defining the territory to be deemed specially benefitted by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams v. Eggleston*, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the Legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefitted by such improvement, it was said: 'Neither can it be doubted that, if the State Constitution does not prohibit, the Legislature, speaking generally, may create a new taxing district, determining what territory shall belong to such district and what property shall be considered as benefitted by a proposed improvement.'"

In *Bauman v. Ross*, *supra*, cited by the Supreme Court of the United States in support of the proposition last above stated, it is said:

"The Legislature, in the exercise of the right of taxation, has the authority to direct the whole or such

part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefitted thereby (citing cases). This authority has been repeatedly exercised in the District of Columbia by Congress with the sanction of this court (citing cases). The class of lands to be assessed for the purpose may be either determined by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefitted, (citing cases). The rule of apportionment among the parcels of land benefitted also rests within the discretion of the Legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners, (citing cases)."

In *Mattingly v. District of Columbia*, 97 U. S., 692, one of the cases cited by the Supreme Court of the United States in support of its opinion in *Bauman v. Ross*, it is said:

"Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question."

Thus it will be seen that the opinion in the *Norwood* case expressly re-affirms the doctrine that the Legislature may direct the whole of the expense of a street improvement to be assessed upon the owners of lands benefitted thereby; and may determine for itself the lands to be assessed by defining a territorial taxing district; and may prescribe the rule of apportionment among the parcels of land included in such taxing dis-

trict, which, in the discretion of the Legislature, may be declared to be in proportion to the frontage of the parcels of land on the street improvement.

In the Norwood case the principle is expressly recognized that the Legislature may prescribe it as a general rule that property abutting on a street opened by the public *shall be deemed* to have been specially benefitted by such improvement and therefore should contribute to the cost incurred by the public. The power denied to the Legislature in the Norwood case is the right to establish an absolute rule that such property, *whether it is in fact benefitted or not by the opening of the street*, may be assessed by the front foot for the cost of the improvement.

In the opinion in the Norwood case the provisions of the Ohio statute relating to street assessments are quoted, from which it appeared that the village of Norwood in making such assessments was authorized to adopt one of two general methods, viz: (1) to place the cost of the street improvement on the general tax list of the corporation; or, (2) if the village declined to adopt that course, it was required to assess such cost upon lots to be designated by the corporation according to directions prescribed by the statute. These directions required the corporation to assess the cost of the improvement "on the abutting and such adjacent and contiguous or other benefitted lots and lands in the corporation, *either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement;*" and, in the case of the opening of a new street, the statute directed that the cost and expense thereof should "be assessed only on the lots and lands bound-

ing and abutting on such part or parts of said street or avenue so improved." In the Norwood case the village of Norwood pursued the latter course and assessed the whole cost on the abutting property.

It will be observed that the Ohio statute, in case a municipal corporation decided not to place the cost of a street improvement on the general tax list of the corporation, prescribed three rules for apportioning the cost of the improvements on individual lots within the corporate limits, viz: (1) *in proportion to the benefits* which may result from the improvement; (2) *according to the value* of the property assessed; (3) *or by the front foot* of the property bounding and abutting upon the improvement; and when a new street was opened the statute required the corporation to adopt the front foot rule.

It is manifest, from the interpretation of the Ohio statute by the Supreme Court in the Norwood case, that, in prescribing three modes for apportioning the cost of a municipal improvement upon lots lying within the corporation, the first of which directed the cost to be assessed *in proportion to the benefits* which might result from the improvement, and the other two directed the apportionment to be made according to a different standard than that of *benefits to the property assessed*, the Legislature of Ohio *did not intend* by either of the last two methods prescribed, to establish a rule for the assessment of the cost based on the principle that the property on which it was to be imposed was specially benefitted by the improvement. At least it is evident that the Supreme Court of the United States was of that opinion, and in the Norwood case expressly held that the Ohio Statute directed a special assessment upon the abutting property by the front foot for the cost of the improvement, *without taking*

*special benefits into account, and that that was the method pursued by the village of Norwood.*

I shall now notice the authorities cited by the Supreme Court of the United States in the Norwood case, with the view of determining for what purpose and in support of what doctrine they were cited. A review of these authorities ought to satisfy the judicial mind that they were cited in support of the doctrine that the right to levy special assessments upon private property to meet the cost of municipal improvements is founded on the principle that the property upon which such assessments are imposed is specially benefitted, and that such authorities were not cited by the Supreme Court of the United States to support the rule that it is incompetent for the Legislature to determine for itself the particular lands to be assessed, so long as they are presumptively benefitted by the improvement, by defining the territorial district embracing such lands, and establishing a rule of apportionment among the parcels of land included in such district, whether such rule be in proportion to the frontage, the area, or the value of the lands.

It is not to be presumed that the Supreme Court of the United States would cite the opinion of a text-writer, or the decision of another court, in support of a principle, when the author of the text-book, or the Court whose decision is cited, expressly holds a contrary view.

The first authority cited by the Court in the Norwood case is Cooley on Taxation. The extracts from Judge Cooley's treatise, quoted in the opinion, clearly declare the principle that special assessments can only be laid on property specially benefitted; but these extracts in no way touch upon the power of the Legislature to establish a taxing district and declare the

rule of apportionment. Judge Cooley, however, in his work on taxation expressly affirms the power of the Legislature to create a taxing district and to fix the rule of apportionment. He states the rule on this point as follows (p. 622):

"But, in truth, there is no universal rule of justice upon which such assessments can be made. Sometimes almost the whole benefit accrues to a few. Sometimes the benefit is distributed with something like regularity through the community. An apportionment of the cost that would be just in one case would be unfair and oppressive in another. For this very reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the Legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. We dismiss this topic, therefore, with the single remark, that with the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

And again, (p. 644):

"The authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment."

And again, (p. 661):

"It is conceded that the legislative judgment, that a certain district is or will be so far specially benefitted by an improvement as to justify a special assessment, is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion is to invoke the judicial authority to give its judgment controlling effect over that of the Legislature, in a matter of the appor-

tionment of a tax, which by concession on all sides is purely a matter of legislation."

The next authority cited in the *Norwood* case is *Macon v. Potts*, 57 Miss., 378, which merely holds that the proceeds of a special assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed.

The next authority cited is *In the Matter of Canal Street*, 11th Wend. 154. The only proceeding in this case was a motion on the part of the corporation of New York to discontinue proceedings, for the reason that the proposed improvement would do more private injury than any public good which would be derived from it. It was not shown in opposition that any injury would accrue to any one by reason of the discontinuance. The only question presented to the Court for determination was the question of the power or jurisdiction on the part of the corporation and the Court to discontinue the proceedings.

The next case cited by the Supreme Court is *McCormack v. Patchin*, 53 Mo., 33. The extract from that opinion simply declares the doctrine that the theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. In this case, however, the Supreme Court of Missouri expressly held that an ordinance of the City of St. Louis, directing certain streets to be repaved with what is known as the Nicholson pavement, and directing the cost and expense of the work to be assessed as a special tax against the owners of the ground fronting on the streets where the work was done, was a valid ordinance, and did not contravene the principle underlying special assessments.

The next authorities cited by the Supreme Court of the United States are New Jersey cases which I will notice hereafter.

The case next cited is *Hammett v. Philadelphia*, 65 Penn. St., 146. It seems clear that this case was not cited by the Supreme Court in support of the doctrine that the Legislature has no constitutional power to establish a taxing district, or to fix the rule of apportionment according to the frontage of the lots; but rather that it was cited as declaring the doctrine that special assessments upon private property can only be imposed when such property is specially benefitted. It was declared in the *Hammett* case that it was a point fully settled and at rest in that State, that the Legislature has the constitutional right to confer upon municipal corporations the power of assessing the costs of local improvements upon the property benefitted, and that on the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water pipes, in proportion to their respective fronts, has been repeatedly recognized and the liens for such assessments enforced. Judge Sharswood, who wrote the opinion of the majority of the Court, finally based the decision upon the fact that the act of the Legislature which he was construing relieved the case of all difficulty and showed upon its face that the special taxation authorized was avowedly for a general and not a local object.

In *Michener v. Philadelphia*, reported in 12th Atl. 174, a case decided long after the decision in *Hammett v. Philadelphia*, Judge Paxson, speaking for the Court, reviews the *Hammett* case as follows:

"*Hammett v. City* appears to have been misunderstood to some extent. At least it is frequently cited as covering a much broader view than its facts, and the decision thereon warrant. That was a case of repaving Broad street. It was held that the original paving of a street is a local improvement, and is within the principle of assessing the cost on the lots lying on it, but Broad street had been paved before, and the cost thereof assessed upon and paid by the property owners. A subsequent act of Assembly required the city to occupy the street 'for its entire length, for the uses and purposes of a public drive, carriage way, street or avenue, or portions thereof, in whole or in part \* \* with such mode of pavement,' etc., as might in the judgment of the city council be best adapted for the uses aforesaid and ordained; that the 'cost of said improvements be paid for by the owners of property abutting on said street'. In other words, the owners of property on Broad street were directed by an act of Assembly and by the city council acting in pursuance thereof, to take up the pavement which they had paid for, and lay down a new and expensive one, not for the benefit of their property, but to provide a grand drive or boulevard for the public generally. This sufficiently appears by the following extract from the opinion of our late Brother Sharswood: 'The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure ground—along which elegant equipages may disport of an afternoon. '".

The next authority cited in the *Norwood* case is *Farnes v. Dyer*, 50 Vt., 469. This case was evidently cited by the Supreme Court of the United States in support of the proposition that the Ohio Statute was unconstitutional, because upon its face it appeared that the village of Norwood was authorized to levy the assessments on the abutting property, without regard

to the fact whether the property was benefitted or not. An examination of the opinion in the Barnes case will make this quite apparent. By an act of the Legislature of Vermont the Court of Common Council of Vergennes were "authorized and empowered to construct or repair sidewalks in the principal streets of said city, and to direct in what manner and of what material such sidewalks should be constructed or repaired, and may assess the owners of property through which or fronting which said sidewalks are constructed so much of the expense thereof as they shall deem just and equitable." Suit was brought to recover an assessment imposed on the defendant for building a sidewalk in front of his block of stores, and the defense thereto was the alleged unconstitutionality of the act of the Legislature. Judge Veazey, delivering the opinion of the Court, said:

"It is not here questioned but that the rule is now settled, that a municipal corporation may be authorized to make a local and special tax or assessment for the building of sidewalks and certain other improvements, within proper village or city limits, and apportion the expense according to the benefit to the abutting premises. *Allen v. Drew*, 44 Vt., 174; 2 *Dill. Mun. Cor. S.* 761; *Cooley Con. Lim.* The defendant claims that by the act in question, thus leaving to a board of officers to say what in their discretion 'is just and equitable', no sufficiently definite legal standard of assessment is fixed, as required by those provisions of the Constitution which were intended as a guard against unequal taxation. The cases differ somewhat as to how the benefit may be determined, whether by the frontage or superficial area; but no such question arises here. The only question here is, whether the phrase 'as they shall deem just and equitable,' is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the

premises fronting on the improved sidewalk, it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnished no certain legal standard of assessment. Did the Court of Common Council determine the amount of this assessment in view of the benefit to the abutting land; or of its value; or of the personal convenience to the defendant; or of the ability of the defendant to pay; or of all these combined? Who can say? Why might they not under this clause assess one man in one view, and another in another view? 'Just and equitable' in respect to what? The words import no special limitation. \* \* \* It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so there is no protection against arbitrary injustice in the imposition of taxes. To secure this protection courts have held that legislative enactments must set up a standard, fix a rule, to be conformed to as a guide in all cases, an uniform, certain rule, so far as reasonably practicable and not susceptible to different applications to different individuals of the class to which it applies. If the enactment fails in this regard, it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which in a constitutional government are designed to protect the individual against injustice and oppression. We think the act in question failed to set up a standard by which all assessments for sidewalks in Vergennes must be made; that the words, 'just and equitable,' do not import, with reasonable certainty, a limitation to particular benefits to property benefitted. We do not know but that one member of the common council construed the words as applying to one consideration; and another member to a different consideration; nor that any of them limited the consideration to benefits. In short the enactment was inadequate to the purpose designed by it."

The next case cited by the Supreme Court of the United States is *Thomas v. Gain*, 35 Mich., 155. This case was doubtless cited to support the conclusion reached in the Norwood case that the Ohio Statute was unconstitutional, because, from the express words of the statute itself, it appeared that the Legislature had established an arbitrary rule for the assessment of the cost of a public improvement on the abutting property, regardless of the fact whether or not the property was benefitted by the improvement.

This appears from an abstract of the opinion in the Thomas case quoted by the Court in the Norwood case as follows:

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in *Tide-Water Co. v. Coster*, 18 N. J., Eq., 519, which has often been cited with approval in other cases."

It further appears that the only purpose of citing the Thomas case is as above stated, from the fact that it is distinctly decided by the Thomas case that the Legislature has the right to apportion the cost of street improvements on abutting property in proportion to the frontage of the property. This doctrine is stated in the Thomas case in the following language (p. 161):

"It has been decided in this State that an assessment of paving and similar taxes may constitutionally be made in proportion to the frontage of lots along the improvement. *Williams v. Detroit*, 2 Mich., 560; *Molz v. Detroit*, 18 Mich., 495; *Hoyt v. Saginaw*, 19 Mich., 39. The idea that underlies statutes for this purpose is, that the benefit to the abutting lots is generally in proportion to the length of their respec-

tive fronts, and that as a rule this principle of apportionment is more just than any other. There is a basis of truth to this idea, and it is so generally accepted that assessments for street improvements are perhaps now more generally apportioned by the frontage than by any other standard."

The next authority cited in the Norwood case is Dillon's Treatise on Municipal Corporations. Considering the extracts quoted in the opinion from Judge Dillon's treatise by themselves, and dissociated from the other authorities cited by the Supreme Court in the Norwood case, the object of the quotation may not be entirely apparent. It is certainly a reasonable inference, however, that these quotations were not made in support of the doctrine that the Legislature could not authorize the cost of street improvements to be assessed on the abutting property, for the reason that in the same work the weight of judicial opinion on that subject is stated as follows: (*Dill. Mun. Corp.*, 4th Ed. Vol. 2, Sec. 752.)

"Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefitted, and, if in the latter mode, whether the assessment shall be upon all property found to be benefitted, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

And, as said Mr. Justice Brewer in his dissenting opinion in the Norwood case, this statement of Judge Dillon was approvingly quoted by the Supreme Court of the United States in *Parsons v. District of Columbia*, 170 U. S., 56.

I shall now direct my attention to the New Jersey cases cited by the Supreme Court of the United

States in the Norwood case, viz: *State, etc., v. Hoboken*, 36 N. J., L., 201; *Bogert v. Elizabeth City*, 27 N. J., Eq., 568; *Tide-Water Co. v. Coster*, 18 N. J., Eq., 519; and *State v. Newark*, 37, N. J., L., 415.

In *State v. Hoboken*, *supra*, the charter of Hoboken provided that the commissioners should examine into the whole matter and should determine and report in writting to the council what real estate ought to be assessed for such improvement, and what proportion of such expense should be assessed to each seperate parcel or lot of land, and that the assessment should be made upon and paid by the lands and real estate, benefitted by the improvement in proportion to the benefits received. Judge Van Syckel, delivering the opinion of the Court, said:

"The report is defective in two particulars; 1st. It does not state that the commissioners examined into the whole matter. 2nd. They say that they have assessed the cost of the work 'according to the provisions of the charter upon the property benefitted by the same,' but they do not certify nor shew that they imposed the burden in proportion to the benefits received. It appears by the testimony of each one of the commissioners, that they assessed all the real estate in the zone of the assessment, to a greater extent than it was benefitted by the improvement. The charter directs that the assessment shall be laid upon the real estate benefitted in proportion to the benefit received. The work in this case having cost more than the benefit to be derived from it will be worth to the land owners who can be assessed, the question is presented, whether the cost in excess of the benefits can be imposed upon such land owners. The Legislature, in conferring this power to assess upon the city government, did not contemplate a case of this kind. The pre-umption was, that no undertaking would be entered upon which would not be remunerative in its results, and which would not confer benefits, at least co-extensive with its cost. In this case, it appearing beyond con-

troversy that there is an excess of expense over benefits, private property is taken *pro tanto* for public use, without compensation.

This decision in no wise impeaches the power of the Legislature to define a taxing district embracing the lands fronting upon the improvement, and to direct the cost of the improvement to be assessed according to the frontage of the lots.

In *Bogert v. Elizabeth City*, *supra*, the charter of the City of Elizabeth directed the whole costs of the assessment for street improvements to be imposed on the property on the line of the street opposite such improvements, such assessment to be made in a just and equitable manner by the common council. The Chief Justice, speaking for the Court, said:

"The sum of the expense is ordered to be put on certain designated property without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burthen is to be born by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to legal rules now at rest in this State, cannot be executed."

The effect of the decision is this: Where the Legislature authorizes a municipal corporation to assess the cost of a street improvement upon the abutting property, and fixes no rule for apportioning the cost among the abutting owners, but leaves that question to be determined by the municipal council in such manner as it shall deem just and equitable, that such a corporation act is invalid.

The cases of *Tide-Water Co. v. Coker* and *Stiles v. Newark*, *supra*, to some extent at least, support the theory that the Legislature has not the power to direct the cost of a public improvement to be assessed

against lands contiguous to the improvement, without expressly providing that such assessment shall be made in proportion to the benefits accruing to the land by reason of the improvement. See, however, the opinion of the Supreme Court of New Jersey in *The State v. Fuller*, in which that Court distinguishes between the character of the work involved in the Tide-water case and ordinary street work directed to be done by a municipal corporation; and where that Court, with remarkable clearness, states the principle, and the reasons for it, which justifies the Legislature in creating a local taxing district, upon which the burden of the cost of local municipal improvements may be laid, and to fix the mode of apportionment whether according to value or frontage.

Admitting that *Tide-Water Co. v. Coster* and *State v. Newark*, *supra*, declare the principle, which it is above conceded that they to some extent tend to establish, it is very manifest that these cases do unequivocally declare the doctrine that the cost of a public improvement can be imposed only on property peculiarly benefitted; and to compel the owner of private property to bear the expense of such an improvement, except to the extent that it is specially benefitted, is *pro tanto* to take private property for public use without compensation.

The important inquiry here is: In support of which of these doctrines did the Supreme Court of the United States cite these decisions in the Norwood case? Certainly not to support the principle first above stated. To do so would be to impute to the Supreme Court of the United States the folly of citing its own previous opinions and many adjudicated cases from other courts upholding the doctrine that the Legislature has the constitutional power to define a

taxing district comprising lands abutting upon a street improvement and to direct that the cost of the improvement be assessed upon such lands in proportion to their frontage upon the improvement, in support of a subsequent decision which absolutely repudiates the doctrine announced in the cases cited. Such a conclusion should not be reached unless the language of the court absolutely compels it.

Recent utterances of the Supreme Court of the United States, made in cases decided by it since the decision was made in the Norwood case, are entirely inconsistent with the contention of Plaintiff's counsel here as to what that Court intended to decide in the Norwood case.

In *Henderson Bridge Co. v. City of Henderson*, 10 Supreme Court Reporter, 562, the Supreme Court of the United States, speaking through Mr. Justice Harlan, who delivered the opinion in the Norwood case, said:

"But in order to bring taxation imposed by a State, or under its authority, within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional, unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments. In the case before us the State Court rejected the idea that the bridge property in question was entirely be-

your municipal protection, and could not receive any of the benefits derived from the municipal government of the City of Henderson. We cannot adjudge that view to be so clearly untenable as to entitle the defendants to invoke the principle that private property cannot be taken for public use without just compensation. \* \* \* In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government. The Court of Appeals of Kentucky, speaking by Chief Justice Marshall, in *Cheaney v. Hoosier*, 9 B. Mon. 330, 345, after observing that there must necessarily be vested in the Legislature a wide range of discretion as to the particular subjects or species of property which should be the subject of general or local taxation, as well as to the extent of the territory within which a local tax shall operate, well said: "There must be a palpable and flagrant departure from equality in the burden, as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others, or for purposes in which they have no interest, and to which they are, therefore, not justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it."

In *City of New Orleans v. Warner*, 20th Supreme Court Reporter, 53, Mr. Justice Brown, speaking for the Supreme Court of the United States, says:

"The expense of keeping streets in order is a public charge, and the same may be said of all other expenses

which are for the benefit of the public. It is true that the expense of paving may be assessed upon the adjoining property upon the theory that such property is specially benefitted by the improvement, but a special provision is necessary to create such a charge."

In my opinion, the foregoing considerations fully justify the conclusion that the Supreme Court of the United States did not intend, by its decision in the *Norwood* case, to abrogate the doctrine, so frequently and uniformly affirmed in its previous decisions, and upheld with scarcely an exception by all the State Courts, that the Legislature possesses the constitutional power, in its discretion, to direct that the cost of a street improvement within a municipal corporation shall be assessed upon the property abutting the improvement in proportion to its frontage.

The question now arises whether the obnoxious features of the Ohio statute, adjudged to be fatal to its validity, are to be found in the statute of this State providing for street improvements in municipalities.

The provisions of our statute, relating to the general subject discussed in the *Norwood* case, are as follows:

Section 2 of the Act describes the different kinds of improvement or work which the city council is empowered to make on the streets of the municipal corporation.

Section 3 of the Act provides that, before ordering any work done or improvement made, the city council shall pass a resolution of intention so to do, describing the work, which shall be posted conspicuously for two days on or near the chamber door of the council, and published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city, and designated by the

council for that purpose. The Street Superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, notices of the passage of said resolution. The notice shall be headed "Notice of Street Work," in letters of not less than one inch in length, and shall, in legible characters, state the fact of the passage of the resolution, its date, and briefly the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for six days in one or more daily newspapers published and circulated in said city, and designated by said city council, or in cities where there is no daily newspaper, by one insertion in a semi-weekly or weekly newspaper so published, circulated, and designated. In case there is no such paper published in said city, said notice shall be posted for six days on or near the chamber door of said council, and in two other conspicuous places in said city, as hereinafter provided. At any time before the issuance of the assessment roll, all owners of lots or lands liable to assessment therein, who, after the first publication of said resolution of intention, may feel aggrieved, shall file with the clerk a petition of remonstrance, wherein they shall state in what respect they feel aggrieved; such petition or remonstrance shall be passed upon by the said city council, and its decision therein shall be final and conclusive.

Said Section 3 further provides that, whenever the contemplated work or improvement in the opinion of the city council is of more than local or ordinary public benefit, the city council may make the expense of such work or improvement chargeable upon a district,

which the city council shall in its resolution of intention declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof. Objections to the extent of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof, may be made by interested parties, in writing, within ten days after the expiration of the time of the publication of the notice of the passage of the resolution of intention. The City Clerk shall lay said objections before the city council, which shall, at its next meeting, fix a time for hearing said objections, not less than one week thereafter. The City Clerk shall thereupon notify the persons making such objections by depositing a notice thereof in the postoffice of said city, postage prepaid, addressed to each objector. At the time specified the council shall hear the objections urged, and pass upon the same, and its decision shall be final and conclusive. If the objections are sustained, the proceedings shall be stopped. If the objections are overruled by the city council, the proceedings shall continue the same as if said objections had not been made.

Said Section further provides that, at the expiration of twenty days after the expiration of the time of said publication by said Street Superintendent, and at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention, the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by the act.

Subdivision twelve of Section 7 of the act provides that, whenever the resolution of intention declares that the costs and expenses of the work and improvement are to be assessed upon a district, the city shall direct the city engineer to make a diagram of the property

affected, or benefitted by the proposed work or improvement, as described in the resolution of intention and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece, or parcel of land, the area in square feet of each of such lots, pieces, or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when such diagram shall have been approved by the city council, the clerk shall, at the time of such approval, certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the Superintendent of Streets of said city, who shall, after the contractor of any street work has fulfilled his contract to the satisfaction of said Superintendent of Streets, or the city council on appeal, shall proceed to estimate upon the lands, lots, or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece or subdivision of land, and shall thereupon assess upon or against said lands in said assessment district the total amount of the costs and expenses of such proposed work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said district benefitted thereby, to-wit: upon each respectively in proportion to estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land.

Subdivision one of Section 7 of the act provides that the expense incurred for any work authorized by the act (which expense shall not include work which shall have been declared in the resolution of intention to be assessed on a district benefitted) shall be assessed upon the lots and lands fronting thereon, except as hercin-

after specially provided; each lot or portion of a lot being separately assessed, in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work.

It is not necessary for this discussion to specify the exceptions thereafter provided for by the statute.

Section 11 of the act provides that the owners, whether named in the assessment or not, feeling aggrieved by any act or determination of the Superintendent of Streets in relation thereto, or having or making any objections to the correctness or legality of the assessment, or other act, determination or proceeding of the Superintendent of Streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of the city council. Notice of the time and place of the hearing, briefly referring to the subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days. Upon such appeal the city council may revise and correct any of the acts or determinations of the Superintendent of Streets relative to the work; may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and may direct the Superintendent of Streets to correct the assessment in any particular, or to make a new assessment, to conform to the decision of the city council in relation thereto. All the decisions and determinations of the city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities and irregularities which the city council might have remedied and

avoided; And no assessment shall be held invalid, except upon appeal to the city council, as provided in this section, for any error, informality or any defect in any of the proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the city council to order the work to be done, for which the assessment is made, has been actually published in any designated newspaper by said city for the length of time prescribed by law, before the passage of the resolution ordering the work to be done.

It is also provided by Section 26 of the act that the city council may, in its discretion, order by resolution, that the whole of the cost and expense of any of the work mentioned, in this act be paid out of the treasury of the municipality, from such fund as the council may designate. Whenever a part of such cost and expense is so ordered to be paid, the Superintendent of Streets, in making up the assessment heretofore provided for such cost and expense, shall deduct from the whole cost and expense such part thereof as has been ordered to be paid out of the municipal treasury, and shall assess the remainder or such cost and expense proportionately upon the lots, parts of lots and lands fronting on the streets where said work was done, or liable to be assessed for such work, and in the manner heretofore provided.

The perusal of the foregoing provisions readily produces the impression that our statute, in its whole structure and evident intent, differs widely from the provisions of the Ohio statute, as construed in the *Norwood* case.

It unmistakably appears from the statute itself that the legislature of this State, in the consideration and passage of the act, had clearly in view the fundamental principle that assessments for the cost of public im-

provements can only be laid upon private property which is specially benefitted thereby, and only to the extent of the benefits received. If this were not so, the statute would be presumed to be constitutional, unless there is something appearing on its face which shows the contrary. Mistaken conceptions as to the true constitutional principles which should control legislative action will not invalidate a legislative act, unless such erroneous conceptions can be discerned in the act itself. This doctrine was clearly recognized in *Walsh v. Barron*, decided by the Supreme Court of Ohio last October, reported in volume 55 N. E. Rep., 164, after that Court had fully reviewed the opinion in the Norwood case in *Schroder v. Overman*, decided by it on the same day (N. E. Rep., Vol. 55, 158). *Walsh v. Barron*, *supra*, involved the validity of an assessment for a street improvement in the City of Columbus. The improvement was made under what was known as the "Taylor Law," applicable only to cities of the class to which Columbus belonged. There existed at the time a general provision (Sec. 2270 Rev. Stat.), which limited assessments made by cities of the grade of Columbus to twenty-five per cent. of the value of the property as returned for taxation. By an amendment made shortly after the adoption of the Taylor Law, it was enacted that this section limiting assessments should not apply to improvements made under that law. The Taylor Law provided that the cost of street improvements should be assessed upon the abutting property, in accordance with the various provisions of the laws of Ohio relating to street assessments applicable thereto, and not inconsistent with the Taylor act. The laws of Ohio then provided that the assessment for the cost of street improvements should be made on the property "fronting or abutting" on the improvement "by the front foot" (See

*Parsons v. City of Columbus*, 34 N. E. Rep., 677); and the assessment considered in *Walsh v. Barron*, *supra*, was levied according to that rule. In *Walsh v. Barron*, *supra*, the Supreme Court of Ohio uses the following language:

"We will not, however, presume that the Legislature intended to adopt an invalid law and will give it such a construction as will support it, if that can reasonably be done consistently with its provisions. It is fair to presume that, in removing the limitation of this section, it was not the intention of the Legislature to permit the city to disregard the fundamental principle which limits an assessment for benefits to the extent of the benefits conferred by the improvement on the land. There is no provision of the law which would indicate this. It must, therefore, be held that all assessments under this law must be limited to the benefits conferred, or it must follow that the Legislature designed a palpable invasion of the rights of private property, which is not admissible. In other words, in authorizing an assessment to pay for improvements under the law, the Legislature had special reference to such assessments as would be no more than the proper proportion of the costs based on the benefits received."

It affirmatively appears, however, from the words of our statute that the Legislature of this State proceeded according to correct constitutional principles in the passage of the act. The statute provides that when the contemplated improvement, in the opinion of the city council, is of more than local or ordinary public benefit that a taxing district shall be created, and the cost of the improvement assessed against the property included in the district, in strict conformity with the principle governing such assessments declared by the Supreme Court in the *Norwood* case. The terms of this provision clearly indicate that the Legislature had in mind the constitutional require-

ment that special assessments can be imposed to the extent only of special benefits received. Is there anything in the language of the act which suggests that the Legislature was influenced by any other consideration, in authorizing assessments according to the frontage of the lots? It would be difficult to find such a suggestion. The Legislature directs that, when the improvement is of more than local or ordinary public benefit, a taxing district shall be designated for the purpose above stated. What is meant by this provision and what do its terms necessarily imply? The improvement of a street must be for a public purpose in order to justify the exertion of the taxing power, but the benefits resulting from such an improvement may chiefly, if not entirely, affect the particular locality where the improvement is made; or they may be diffused largely, if not generally, to other parts of the corporate limits. Local public benefit means the benefit accruing from a public improvement to the particular locality where it is made, viz.: the property abutting on either side of the improvement. It is not difficult to conceive of instances where the benefit resulting from the improvement of a street, on account of its location and the situation of the abutting property in relation to the connecting street or streets, would accrue primarily, if not wholly, to the property abutting on the improvement. Ordinary public benefit arising from the improvement of a street means the benefit which the public usually derives from the improvement of streets. If a street in its natural state is virtually impassable on account of hills and ravines, and where it would require a large expenditure of money to make it available for public use, and there is a pressing public necessity that it be opened for travel, the improvement of such a street would be included in the category of improvement of more than

ordinary public benefit. Other instances of a like character might be given. The sense of the statute then is this: That there is a presumption that the abutting property is specially benefitted to the extent of the cost of street improvements of simply local or ordinary public benefit; that, if such improvements have more than local or ordinary public benefit, a tax-district is to be created, including such property as shall be specially benefitted by the improvement, to be assessed according to the benefit received by the property. This presumption is not made conclusive by the statute; nor is the city council directed to arbitrarily enforce the statutory rule in all cases, irrespective of the fact whether or not special benefits are received which shall equal the assessments imposed on the abutting property. Where injustice would result from the enforcement of the front-foot rule, the city council may decline to order the improvement at all, or may direct the whole cost to be paid from the city treasury, or such part thereof as may be sufficient to relieve the abutting owners from unjust assessments. Where there is abutting property on a street which would receive little or no benefit from the improvement of the street, the city council may order that portion of the street to be improved under a separate proceeding, and direct the whole cost thereof to be paid out of the public treasury, under the provisions of the statute which authorize the city council to order the whole, or any portion, either in length or width, of a street to be improved. These provisions enable the city council to make street improvements anywhere within the municipality, without casting upon the abutting property a burden which would exceed the benefits received; and the statute clearly implies the performance of such duty.

Mr. Justice Harlan, delivering the opinion in the Norwood case, distinguished it from the case of *Spencer v. Merchant*, 125 U. S., 345, and declared that the decision in the Norwood case was not necessarily controlled by that in the Spencer case, for reasons stated by him as follows:

"It (the Spencer case) related to an assessment, by legislative enactment, upon certain isolated parcels of land, of a named aggregate amount which remained unpaid of the cost of a street improvement. In reference to the statute the validity of which was questioned, the Court said: 'By the statute of 1881, a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the Legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the Legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the *whole* amount of the assessment.' Again: 'The statute of 1881 afforded owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled.' The point raised in that case—the *only* point in judgment—was one relating to proper notice to the owners of the property assessed in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion in the Spencer opinion in that case."

It thus will be seen, from the construction placed by Mr. Justice Harlan on the decision of the Supreme Court of the United States in the Spencer case, that, in the opinion of that Court, assuming that a State statute providing for the apportionment of an assessment for street improvements on private property was unconstitutional, nevertheless, if the statute furnished the land owners affected by the assessment an opportunity to be heard, upon the question of its apportionment, before the board which was authorized to make it, they were thereafter estopped to raise the question of the constitutionality of the statute.

As appears from the judgment pronounced in the Norwood case (p. 297), the assessment against the plaintiff's abutting property was adjudged to be void, on the ground that it was made under a rule *which excluded any inquiry as to special benefits*. In the Spencer case the statute of New York directing the assessment was just as objectionable, on constitutional grounds, as was the Ohio statute reviewed in the Norwood case; but the Supreme Court of the United States sustained the assessment under the New York statute, because it afforded the land owners an opportunity to be heard on the question of apportionment among themselves, and thus enabled them to test the constitutionality of the statute.

If the remarkable doctrine, announced in the Spencer case as to the efficacy of a statutory provision affording owners an opportunity to be heard upon the question of apportionment, is applied to the provisions of our statute, there will be no difficulty in sustaining the validity of the front-foot assessment rule; since the statute provides for an appeal to the city council by any owner having or making any objection to the correctness, or legality of the assessment made by the su-

perintendent of streets, upon which appeal the council may set aside, alter, modify or correct the assessment in such manner as to them shall seem just.

It is not necessary, however, to decline to pass upon the constitutionality of the act of our Legislature, or the validity of the front-foot method of assessment provided by the statute, because the plaintiff in this action had an opportunity to appeal to the city council, and obtain a hearing before that tribunal upon the question of the correctness or validity of the assessment. Notwithstanding what is said by Mr. Justice Harlan as to the only point determined by the judgment in the *Spencer* case, I do not believe that the judgment of a city council as to the constitutionality of our street improvement act, one way or the other, would affect the right of a land owner to afterwards raise the same question in the courts of the State. Under the provisions of our act, unless the city council determines to establish a taxing district, or directs that the whole cost of a street improvement be paid out of the city treasury, the only rule of assessment prescribed is to levy the amount to be collected upon the lands fronting on the improvement, in proportion to their frontage, at a rate per front foot sufficient to cover the amount assessed. Our statute, however, affords the land owner ample opportunity to be heard on the question whether an assessment by the front-foot rule will impose upon his abutting property a greater burden than the special benefits which it will receive from the improvement itself. When the city council contemplates the erection of a special taxing district, comprising the lands which are to be assessed for the cost of the street improvement, such fact must be stated in its resolution of intention. If such a statement does not appear in the resolution of intention,

then it follows, as matter of law, knowledge of which is imputed to the land owner, that the whole or some part of the cost of the improvement is to be assessed upon the abutting property, according to its frontage on the improvement. The statute provides that due notice of the passage of the resolution of intention shall be given by posting and publication. It is also provided that, after the first publication of such resolution, any owner of lands liable to be assessed, who feels aggrieved, *shall file* with the clerk a petition of remonstrance wherein he shall state in what respect he feels aggrieved; and that such petition or remonstrance shall be passed upon by the city council, and that its decision shall be final and conclusive. The passage of a resolution of intention, (wherein the purpose of the city council to form a taxing district is not stated), and the publication and posting thereof as required by statute, apprizes all of the abutting land owners of the intention of the city council to order the street improvement to be made, and to assess the whole, or a portion, of the cost thereof on the abutting property in proportion to its frontage. Every land owner is thus afforded an opportunity, before the work is ordered, to be heard on the question whether an assessment on his property, by the front-foot rule, for its proportion of the cost of the improvement, will exceed the value of the special benefits accruing to his property by reason of the improvement; and, if he fails to present such question to the city council, he is forever thereafter precluded from raising it. What other purpose, than the one mentioned, could the Legislature have had in view in requiring notice to be given of the passage of the resolution of intention to make a street improvement? It may be that property owners have a right to be heard on the subject whether or not the public interest or convenience requires the im-

provement; but whether they have such right is a doubtful question, as that is a matter of public policy vested entirely in the discretion of the legislative body. There can be no reasonable doubt of their right to be heard on the question of special benefits; and that, if it appears to the city council that the abutting property will not be benefitted to the extent of the cost of the improvement, it may decline to order the work done; or may order the whole of the cost to be paid out of the city treasury, or such proportion thereof as will leave the remainder a just charge against the abutting property.

Mr. Justice Harrison, speaking for the Supreme Court of this State, in *Bolton v. Gilleran*, 105 Cal., 248, and referring to this question, uses the following language:

"A prominent consideration before this body (the city council), in determining whether an improvement shall be made upon a street, is the amount of its expense *and the advantage that will accrue therefrom to the property which is to be charged with that expense*; and unless it can know to a reasonable degree of certainty what the expense will be, it will be unable to exercise any intelligent discretion in determining whether the improvement should be made. Hence, it becomes necessary for the legislative body to know the probable expense of the improvement before it will order it to be made."

Mr. Justice Temple, delivering the opinion of the Supreme Court of this State in *Harnes v. Hanson*, 113 Cal., 317, says:

"Possibly if, as a matter of law, we could see that the structure could not be useful, the conclusion of the board would not prevent the courts from giving relief. But the aggrieved owner should exhaust the special remedies provided before he applies to the Court. The board could have afforded him all the relief he re-

quired. If he had protested in time, the contractor might not have expended his money and labor in the improvement of the property. Since the law provided that he should object, and he did not, he should not now be heard, unless there was a total absence of power in the board to do the work, or the procedure has been materially departed from. A property owner should not thus sit by and see his property improved and expect to escape the expense."

The statute provides that, before the passage of the resolution for the construction of the improvement, the city council may require plans and specifications and careful estimates of the costs and expenses thereof to be furnished by the city engineer of the city; and it would seem to be the clear duty of the council to do so when a protest was made against the making of the improvement, on the ground that the cost thereof would exceed the special benefits received, for the purpose of enabling it to exercise an intelligent discretion in determining that question. The city council is under no legal compulsion to afterwards accept the lowest proposal or bid to do the work; but may reject any and all proposals or bids "should it deem this for the public good." It follows then that it would be the duty of the city council to reject any bid, fixing so high a price for doing the work as to materially prejudice the land owner, in view of the facts previously found by the city council on the hearing and decision of a protest made by such land owner.

It seems to be clear from the foregoing review of the provisions of our statute, and the utterances of our Supreme Court above quoted, that the statute of this State relating to street improvements does provide for an inquiry as to the special benefits which will accrue to the property to be assessed for the cost of the improvement, and that its provisions in no respect

militate against any principle declared by the Supreme Court in the Norwood case.

Again, as said by the Supreme Court of this State in *Ramish v. Hartwell*, reported in 58th. Pacific Reporter, 920:

"It may be added that the statute does not deprive the owner of the right to challenge the validity of the assessment or to present any irregularities in the proceedings therefor which would defeat an action for its enforcement, since it provided by section 4 that at any time before the issuance of the bond the owner may notify the city treasurer that he desires no bond to be issued for the assessment against his land, and that upon such notice no bond shall be issued therefor, but the payee of the warrant must enforce the collection of the assessment by action. As the bond cannot be issued until after thirty days from the date of the warrant, and as the assessment must be demanded within that period of time, the owner has at all times the option to insist upon the collection of the assessment by a suit therefor, in which he may present all defences, either in matters of jurisdiction or irregularity of proceedings."

This brings our statute, in respect to its provisions for notice and hearing as to the apportionment of the cost of the improvement, within the doctrine decided by the Supreme Court of the United States in *Hager v. Reclamation District*, 111 U. S., 705, and upon the authority of that decision the constitutional validity of our statute must be upheld.

My conclusion is that there were no jurisdictional defects in the street improvement proceedings referred to in the amended complaint, and that no constitutional objections can be successfully urged against the street improvement act of this State.

The demurrer, so far as it is directed against the

first two alleged causes of action in the amended complaint, is sustained.

E. S. TORRANCE,

Judge of the Superior Court.



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